



IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. **88-1827**

REUBEN W. MOORE,

Petitioner

v.

SIDNEY H. MOORE,

Respondent

**PETITION FOR A WRIT OF
CERTIORARI TO THE COURT OF
APPEALS OF THE DISTRICT OF
COLUMBIA**

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v.

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**PETITION FOR A WRIT OF
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COLUMBIA**

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the District of Columbia entered on February 15, 1979, petition for rehearing en banc denied April 13, 1979.

CITATION TO OPINIONS BELOW

The opinion of the Superior Court of the District of Columbia granting the respondent a divorce a vinculo matrimonii, custody of the minor child, alimony, child support and attorney's fees is unreported but is printed in Appendix A hereto. The opinion of the Court of Appeals reversing the judgment of the Superior Court of the District of Columbia except as to the award of

attorney's fees is printed in Appendix B hereto and is not yet reported in the official reports.

JURISDICTION

The judgement of the Court of Appeals of the District of Columbia, printed in Appendix B hereto, was entered on February 15, 1979. The Court of Appeals of the District of Columbia denied the petitioner's request for rehearing en banc on April 13, 1979. See Appendix C hereto.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

THE QUESTION PRESENTED

Is it an abuse of discretion for the Court of Appeals of the District of Columbia to allow an unsuccessful litigant to recover an award of attorney's fees as against her successful adversary?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the due process clause of the fifth amendment to the United States Constitution and the guarantee of equal protection contained in the fifth amendment to the United States Constitution as construed by this Court in *Bolling v. Sharp*, 347 U.S. 497 (1954). These provisions are printed in Appendix D hereto.

STATEMENT

Proceedings In The Superior Court Of The District Of Columbia

On December 8, 1977 the Superior Court of the District of Columbia, Atkinson, J., awarded a decree

of divorce, custody of the only child of the parties, alimony, child support and counsel fees to Sidney H. Moore, respondent herein. See Appendix A hereto. Thereafter, the judgment of the Superior Court was appealed to the District of Columbia Court of Appeals.

Proceedings In The District Of Columbia Court Of Appeals

The District of Columbia Court of Appeals reversed the judgment of the Superior Court on the basis that the respondent herein had failed to make a prima facie case of constructive desertion.

In the course of its opinion, however, the District of Columbia Court of Appeals indicated that the respondent herein should still receive an award of attorney's fees. See Appendix B hereto. Petitioner's request for rehearing en banc on this issue was denied. See Appendix C hereto.

REASON FOR GRANTING THE WRIT

This petition raises substantial and important questions concerning the administration of justice in domestic relations matters. This Court has not passed upon the rights of husbands, in the context of divorce proceedings, to be free from deprivation of property without due process of law. Further, the existing case law on this issue indicates that a gender based classification is involved.

The rationale of awarding attorney's fees to a successful plaintiff in certain types of cases is that those who have a valid claim would otherwise be precluded from asserting their legal rights. While this is a legit-

imate position when applied to successful litigants its purpose is not fulfilled by awarding attorney's fees to unsuccessful litigants. This allows those who possess invalid legal claims to harass innocent parties and then have the innocent parties pay the costs of being harassed. Such an award deprives the party ordered to pay attorney's fees of property without due process.

Petitioner recognizes that the great weight of case law on the issue of awarding attorney's fees to wives who are unsuccessful in divorce actions favors such awards. See cases collected in 32 A.L.R. 3d 1227. Petitioner submits, however, that awards of attorney's fees under such circumstances are gender based and deny petitioner equal protection of the law. It is well established that a gender based classification must serve important governmental objectives and must be substantially related to achievement of those objectives or the classification is invalid. *Califano v. Webster*, 430 U.S. 313 (1977). Petitioner's position is also supported by the recent decision of this Court in *Orr v. Orr*, ____ U.S. ____, 99 S. Ct. 1102 (1979).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Family Division**

Civil Action No. D. 122-77

SIDNEY H. MOORE

Plaintiff

v.

REUBEN W. MMOORE, JR.,

Defendant

Decree Of Divorce

This cause came on for hearing before the Court on October 11, 12, and 19, 1977. The Court has reviewed and considered the pleadings and papers filed herein, considered all the evidence adduced in Open Court, evaluated the demeanor of the witnesses and heard the arguments of counsel, and based on that makes the following:

FINDINGS OF FACT

1. Plaintiff, SIDNEY H. MOORE, and Defendant, REUBEN W. MOORE, JR., were married on October 19, 1968, in the District of Columbia. One child was born of this marriage, namely, JESSICA HARRISON MOORE, born on August 4, 1973, and now four years of age.
2. During the month of December, 1975, the mother, SIDNEY H. MOORE, removed herself and the minor child from the parties' marital home at 109 Sixth Street, N.E. in the District of Columbia and went to Schenectady, New York, where her parents live.
3. The Plaintiff removed herself and the minor child from the home as a result of the Defendant's treatment of her, involving his adulterous conduct which he admitted

to her and which he refused to terminate. The Plaintiff, because of this conduct, at first moved her sleeping quarters to a different room in their home and avoided sexual relations with him. Despite repeated requests by her in the few weeks following for his assurance that he would terminate the adulterous relationship, he refused to give the requested assurance, and Plaintiff left the home just before Christmas in 1975, advising the Defendant by a note that she was leaving.

4. Upon arrival in Schenectady, New York, Plaintiff and the parties' child lived for a short time with her parents, and then settled in an apartment adjoining her parents' home.

5. Shortly after Plaintiff's arrival in Schenectady, Defendant brought a custody action in that city, as a result of which some visitation arrangements were provided for Defendant.

6. During the month of February, 1976, and continuing into March, 1976, the Defendant, with the aid of private detectives, removed their minor child from Plaintiff's physical custody without her consent, and traveled with the child first to the District of Columbia. While in this city, he was served with a Writ of Habeas Corpus brought by Plaintiff. Defendant ignored the Writ and immediately left with the child for the Federal Republic of Germany and the Bahamas. The Plaintiff had no knowledge of the whereabouts of the child during the approximate two weeks of overseas travel.

7. The Plaintiff regained custody of the minor child in the District of Columbia on or about March 17, 1976, by physically taking the child from the Defendant when the Plaintiff saw the child outside Sibley Memorial Hospital. She has had physical custody continuously since.

8. After over a year of seeking employment in the Schenectady area and elsewhere, in the summer of 1977, Plain-

tiff obtained employment as a Professor of anthropology and religion at a college in Rock Hill, South Carolina. She and the child have been living in South Carolina in an apartment since August of 1977. The child attends a day-care center sponsored by the college on its campus.

9. The Defendant-father has continued to reside at the former marital home in the District of Columbia. He has been a resident of the District of Columbia for more than one year next preceding the filing of the Complaint herein.

10. Both parents are very interested in the welfare and raising of the child, and both are devoted to the child.

11. The child has fared well and has prospered in the custody of the Plaintiff-mother since December of 1975. The Court believes it is in the best interests of the child for her to continue in the custody of Plaintiff. Plaintiff is well suited to continue the care and raising of JESSICA. Numerous witnesses, including some called by Defendant, referred to Plaintiff as an excellent parent.

12. Defendant provided little or no support to Plaintiff and the minor child while they were in Schenectady, New York, although able so to do. Defendant offered to support Plaintiff and the child if they would return to the District of Columbia to live, but not otherwise. Plaintiff, while seeking employment applied for and obtained public assistance. Commencing in early 1977, Defendant has been providing \$500.00 per month for Plaintiff and \$500.00 per month for the child by virtue of an Order entered in Civil Action No. D 1304-76.

13. Defendant-father is a successful businessman, and heads two corporations in the District of Columbia. His annual gross income approximates \$44,000.00. He submitted no financial statement. He is part owner of a building which houses his business. He appears to have no liabilities. He has the ability to contribute toward family support.

14. Plaintiff has a Ph.D. in anthropology. She has a one-year contract with the college in Rock Hill, South Carolina. Her gross monthly earnings are \$1,397.50. After deductions, her monthly net income is \$914.12. She lists total expenses of \$1,805.00 per month of which \$1,116.00 is for herself and \$689.00 is for the child. Of the \$689.00, for the child, \$155.00 per month is for day care and sitters. The expenses listed on the budget for the child are reasonable. Of the \$1,116.00 for herself, \$310.00 represents monthly payments on part of a group of liabilities approximating \$12,748.00, most of which were incurred during the period when she was receiving no support from Defendant and in connection with her move to her employment in South Carolina. Plaintiff has no assets. It would appear that when these debts are paid, Plaintiff will have the ability to provide for her own support. Until that time, however, she has need for financial aid from the Defendant. She is entitled to such help and he has the ability to provide it.

15. The difference between Plaintiff's net income of \$914.12 and the combined expenses for herself and the child of \$1,805.00 is a deficit of \$891.00. The Court recognizes that Plaintiff must pay income taxes of approximately 30% on any alimony award. The Court believes the Defendant should continue to provide child support of \$500.00 per month and alimony for the Wife of \$450.00 per month until further order of this Court.

16. Real property located at 109 Sixth Street, N.E. in the District of Columbia is titled in the joint names of the parties. The parties purchased the property following their marriage, and each signed the mortgage on the property. The payments were made by the Defendant. The Plaintiff was a homemaker and mother during this time and obtained her doctorate during the marriage. In view of the above considerations, plus the relative difference in income and assets, the Court believes it is equitable that each party be declared to be the owner of 50% of the property.

17. The Plaintiff seeks reimbursement of counsel fees for services rendered to her in this action in the approximate amount of \$5,000.00, including disbursements, which sums have either been borrowed or are owed. Her counsel submitted a detailed statement. The Court believes a reasonable contribution toward these counsel fees from the Defendant would be \$_____.

18. The Defendant presently has in the registry of this Court, pursuant to the Court's Order in Civil Action D 1304-76, a bond in the sum of \$7,500.00 for the faithful return of the minor child of the parties in the exercise of his rights to visitation. The Court believes this bond should remain in the registry of the Court until further Order of the Court.

CONCLUSIONS OF LAW

1. Plaintiff is entitled to a Decree of Divorce *a vinculo matrimonii*. She was justified in leaving the parties' marital home by reason of the Defendant's conduct toward her which constituted constructive desertion. It has continued for more than one year without cohabitation.

2. The best interests of the minor child will be served by awarding custody to Plaintiff, with reasonable rights of visitation in the Defendant.

3. Defendant should be required to make a contribution toward the support of Plaintiff and the minor child.

4. The parties should each be declared to be owner of 50% of the real property jointly titled in their names in the District of Columbia.

5. Defendant should be required to make a reasonable contribution to the cost of Plaintiff's legal representation for herself and the minor child in this cause.

6. The Defendant should be required to continue his bond for the faithful return of the minor child to the cus-

tody of the Plaintiff in the exercise of his right of visitation.

ORDER

WHEREFORE, the premises considered, IT IS by the Court this _____ day of _____, 1977,

ORDERED:

1. That the Plaintiff, SIDNEY H. MOORE, be, and she hereby is granted a Decree of Divorce *a vinculo matrimonii* from the Defendant, REUBEN W. MOORE, JR., on the ground of constructive desertion continuing for more than one year without cohabitation.

PROVIDED, however, that this Decree shall not dissolve the bonds of matrimony existing between the parties until the expiration of the time for the taking of an appeal and the completion of any appeal taken.

2. That Plaintiff, be, and she hereby is, awarded custody of the minor child of the parties, JESSICA HARRISON MOORE, with reasonable rights of visitation reserved to Defendant.

3. That Defendant be, and he hereby is, required to pay the sum of \$450.00 per month to Plaintiff toward her support and maintenance until further order of Court, the first payment to be made on December 1, 1977, and continuing thereafter on the 1st day of each month, such payments to be made through the Clerk of this Court.

4. That Defendant be, and he hereby is, required to pay the sum of \$500.00 per month to Plaintiff for the support of the minor child, the first payment to be made on December 1, 1977, and continuing thereafter on the 1st day of each month, such payments to be made through the Clerk of this Court.

5. That Defendant be, and he hereby is, required to pay the sum of \$_____ to Plaintiff as his contribution

toward counsel fees for the services rendered to her and to the parties' minor child in this action, for which sum Plaintiff shall have judgment.

6. That Defendant be, and he hereby is, required to continue his bond in the amount of \$7,500.00 in the registry of the Court for his faithful return of the minor child to the custody of Plaintiff, in the exercise of his right to visitation.

RICHARD R. ATKINSON
JUDGE, Superior Court of the
District of Columbia

SUBMITTED:

/s/ ELIZABETH GUHRING
ELIZABETH GUHRING
Counsel for Plaintiff
Suite 1011, 1730 K Street, N.W.
Washington, D.C. 20006
659-3690

Appendix B

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 13099

REUBEN W. MOORE, JR., APPELLANT,

v.

SIDNEY H. MOORE, APPELLEE.

Appeal from the Superior Court of the
District of Columbia

(Hon. Richard R. Atkinson, Trial Judge, Retired)

(Argued November 9, 1978 Decided February 15, 1979)

Thomas Fortune Fay for appellant.*Pamela B. Dulles*, with whom *Elizabeth Guhring* was on
the brief, for appellee.Before NEWMAN, Chief Judge, and HARRIS and
MACK, Associate Judges.

PER CURIAM: Appellant seeks reversal of a decree of absolute divorce entered on the grounds of constructive desertion continuing for more than one year. He contends that the evidence is not sufficient to sustain the decree. We agree, vacate the decree of divorce, and remand the case with instructions that a decree of divorce be entered under the District of Columbia Marriage and Divorce Act of 1977.

The parties were married in 1968 and lived in the District of Columbia from that time as husband and wife. In the autumn of 1975 Mrs. Moore began to have suspicions concerning her husband's extra-marital activities. Sometime thereafter he told her that, in fact, he was seeing other women. On December 23, 1975, Mrs. Moore left the marital abode.

On January 18, 1977, Mrs. Moore filed a complaint for absolute divorce in the District of Columbia alleging ground of constructive desertion. The matter came to trial on October 11, 1977. At trial the following testimony was presented concerning Mr. Moore's alleged adulterous conduct:

Testimony that appellant and the parties' daughter, along with a woman identified as Bobbie, were in a canoe when it overturned;

Mrs. Moore's testimony that, after she learned of Bobbie's existence, Mr. Moore stated that he had had sexual relations with Bobbie, that he intended to continue seeing Bobbie, and that he was seeing other women as well;

Mrs. Moore's testimony that Mr. Moore did not come home on approximately six occasions;

Mr. Moore's testimony that, before her departure, he had told his wife he was seeing another woman, that he did not know what to do about the relationship, but that he did not refuse to terminate it;

Mr. Moore's testimony that he had sexual relations with Bobbie (although it is only Mrs. Moore's testimony that pictured this as occurring prior to her departure from the marital abode);

Evidence that Mr. Moore invoked his Fifth Amendment privilege against self-incrimination concerning his relations with other women at two separate hearings.¹

On December 8, 1977, the trial court entered a decree of divorce on the grounds of constructive desertion for a period of more than one year. Mr. Moore's appeal followed.

¹ Appellant contends that the court erred in permitting evidence to be introduced of his exercise of his Fifth Amendment rights. We need not resolve this issue, for even assuming no error, there was still insufficient evidence to sustain the decree.

D.C. Code 1973 § 16-904(a), prior to its amendment by the District of Columbia Marriage and Divorce Act of 1977, D.C. Law 1-107, stated that "A divorce from the bond of marriage or a legal separation from bed and board may be granted for . . . actual or constructive desertion for one year. . . ." To prove constructive desertion, one spouse "must show misconduct by the other spouse forcing the former to abandon the marital abode." *Hales v. Hales*, D.C. App., 207 A.2d 657, 658-59 (1965). "Acts justifying abandonment must be such as would support a decree for divorce." *Id.* at 659; *Schreiber v. Schreiber*, D.C. Mun. App. 139 A.2d 278, 279 (1958); *Underwood v. Underwood*, 50 App.D.C. 323, 324, 271 F. 553, 554 (1921); *Hitchcock v. Hitchcock*, 15 App.D.C. 81, 88-89 (1899). Among the examples of misconduct justifying one spouse in leaving is included "open and notorious adultery with a third person." *Hales v. Hales*, *supra* at 659 (emphasis added). "In this jurisdiction it is well settled that adultery must be proved by *clear and convincing* evidence. Mere circumstances of suspicion are insufficient to sustain the charge." *Beckwith v. Beckwith*, D.C. App., 379 A.2d 955, 961 (1977), *cert. denied*, 436 U.S. 907 (1978) (emphasis added); *Snyder v. Snyder*, D.C. App., 222 A.2d 850, 851 (1966); *Stephenson v. Stephenson*, D.C. App., 221 A.2d 917, 918 (1966). Confessions of adultery "must be well established, direct, certain, free from suspicion of collusion, and *corroborated by independent facts and circumstances*." *Hagans v. Hagans*, D.C. App., 215 A.2d 842, 844 (1966) (emphasis added) (footnote omitted). It was incumbent upon appellee to prove "open and notorious adultery" by "clear and convincing evidence."

Tested by these standards, the proof in this case is insufficient. There is no evidence of "open and notorious" conduct, meretricious or otherwise. In summary, the evidence essentially consists of an admission by a husband that he had sexual relations with a woman who had once been in a canoe where both he and his daughter were

present. This is not the type of "clear and convincing evidence" of "open and notorious adultery" required by our decisions.

Under the provisions of the District of Columbia Marriage and Divorce Act of 1977, enacted on April 7, 1977,² "A divorce from the bonds of marriage may be granted if . . . (2) both parties to the marriage have lived separate and apart without cohabitation for a period of one year next preceding the commencement of the action." D.C. Code 1978 Supp., § 16-904(a)(2). The Act also provides that one of the parties to the marriage must have been a *bona fide* resident of the District of Columbia for the six months preceding filing the action. D.C. Code 1978 Supp., § 16-902.

The courts of this jurisdiction have long held that when the legislature liberalizes the law pertaining to divorce, and the legislation is silent on retroactivity, a divorce may be granted for grounds, created by that law, maturing both before and after that law's effective date.³ *Tipping v. Tipping*, 65 U.S.App.D.C. 222, 224-25, 82 F.2d 828, 830-31 (1936). See generally 2Green and Long, *The Real and Illusory Changes of the 1977 Marriage and Divorce Act*, 27 CATH. U. L. REV. 469, 506-08 (1978). On at least one prior occasion, we have remanded an action brought under the pre-1977 statute to be considered under the present statute. *Williams v. Williams*, D.C. App., 378 A.2d 668, 670 (1977). In the case at bar, appellant had counterclaimed for divorce, alleging one year's separation, a ground provided in the new statute. D.C. Code 1978 Supp., § 16-904(a)(2).

² The statute became effective after the complaint was filed but before the matter came to trial.

³ We express no view as to the effect of the new law on grounds for divorce under the old law in actions filed prior to and pending on the date the new law became effective.

The findings of the trial court indicate that the parties to the marriage have lived separate and apart without cohabitation for a period of one year next preceding the commencement of the legal action and that Mr. Moore was a resident of the District of Columbia for at least six months preceding commencement of the legal action. Since the requirements of §§ 16-902 and -904(a)(2) have been met, we remand the case and instruct the trial court to enter a decree of divorce under the current law.⁴

Decree vacated, and the case remanded with instructions.

⁴ Appellant candidly conceded at oral argument that his challenge to the decree of divorce is a vehicle to upset the award of attorney's fees, etc. which appellee received. He acknowledged his interest in having the bonds of matrimony dissolved. He is mistaken in his belief that if his wife is unsuccessful in her action for divorce, the court could not award attorney's fees to her. See *Jacobson v. Jacobson*, D.C. App., 277 A.2d 280, 284 (1971); *Ritz v. Ritz*, D.C.App., 197 A.2d 155, 157 (1964); *Myers v. Myers*, 55 App.D.C. 224, 225, 4 F.2d 300, 301 (1925).

In this appeal, he does not *directly* challenge the award of attorney's fees. Hence, we have no occasion to disturb that portion of the trial court's ruling.

Appendix C

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 13099

REUBEN W. MOORE, JR.

Appellant

v.

SIDNEY H. MOORE

Appellee

APPEAL FROM A FINAL ORDER OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

FAMILY DIVISION DOMESTIC RELATIONS BRANCH

Petition For Rehearing En Banc

STATUS OF CASE

This matter came before the Court for oral argument on November 9, 1978. A decision of the Court was entered on February 15, 1979. This Petition is filed within fourteen days of the entry of the decision in accordance with District of Columbia Court of Appeals Rule 40.

SUMMARY OF ARGUMENT

1. A decision of the Court of Appeals entered on February 15, 1979 was silent as to the effect of that decision on the question of alimony. Prior to the filing of this case the appellee had been awarded separate maintenance by a decision of the Superior Court of the District of Columbia, Family Division, which award was reversed by this Court in D.C.C.A. No. 12312. The decision of the Court of Ap-

peals in No. 13099 essentially was that the Trial Court enter a decree of divorce upon the counter-claim of the appellant. At the time of the proceedings in the lower Court the Trial Judge was merely reviewing the findings previously entered as to separate maintenance to determine whether there were changed circumstances. However, since the date of the decision of this Court of No. 12312 no alimony has been paid. The decision of the Trial Judge in this case is without meaning in terms of the prior determination and appeal.

It is submitted that the remand to the Trial Court should give some type of instruction with regard to alimony. The appellant strongly feels that rehearing and argument on the content of this instruction are required.

2. The decision of the panel remanding the case left undisturbed an award to attorney's fees which were expended attempting to prove the cause of action for desertion. Quite obviously the appellee proceeded on this grounds in order to use its emotional impact as a device to support its request for other relief. Having utterly failed to prove the elements of constructive desertion the appellee is not entitled to an award of counsel fees.

ARGUMENT

(1) *Alimony*

Prior to the trial held on this matter in the Trial Court a prior trial had set an amount in separate maintenance. That prior decision was appealed to this Court designated as District of Columbia Court of Appeals Number 12312 and a decision entered on August 29, 1978. The determination of this Court reversed the prior finding of the Superior Court as to separate maintenance and remanded the case thus terminating separate maintenance at that point. The Trial Court sitting on the matter presently before the Court was therefore acting only to review the prior finding

to determine whether or not there were changed circumstances. Therefore, the decision of this Court reversing the Trial Court as to the matter of divorce and remanding the decision for entry of a decree based on one year separation per the counterclaim of appellant leaves the matter of alimony in limbo.

Although it seems clear that with the dismissal of the prior separate maintenance claim no amounts in alimony are payable from the date of the original determination by the Trial Court to the date of entry of a judgment of absolute divorce based on one year separation it is not clear whether the Trial Court on remand should dismiss the prayer for alimony or hold a new hearing to determine whether any award of alimony is appropriate, to either party. It should be noted in this regard that in view of the fact that a Trial Court will be proceeding under the District of Columbia Marriage and Divorce Act of 1977, either party may be awarded alimony. Under the prior Act only the wife could be awarded alimony. District of Columbia Code, Section 16-911.

Finally, it should be noted that the counterclaim was not permitted to be filed and if judgment is to be entered on the counterclaim under the District of Columbia Marriage and Divorce Act of 1977 the remand should explicitly state same as well as allowing the appellant to present testimony which could not have been presented on the original trial of this matter as it would have been irrelevant. The enactment of the District of Columbia Marriage and Divorce Act of 1977 establishes a totally different philosophy to guide the courts in divorce actions than that which pertained previously. Under the prior law the wife, by statutory provision, was a privileged suitor and able to collect alimony to the exclusion of the husband based upon her needs and the husband's earning capacity. Quite obviously with both parties able to collect alimony the Court is required to balance the equities in determining whether either party is entitled to some net sum allowance from

the other. In the case before the Court the appellee holds a Ph.d. degree in anthropology and is obviously employable at a high salary although it would appear that her efforts to obtain employment have been virtually nonexistent perhaps believing that she was entitled under the former District of Columbia law to a free lifetime ride on Mr. Moore's broad shoulders.

It is submitted that the matter of alimony alone requires that this matter be set for rehearing in order that the Court might be assisted in entering a further order guiding the Trial Court in its consideration of this aspect of the case.

(2) Attorney's fees

The panel rendering the decision in the case below stated as a footnote that the appellee could be awarded attorney's fees even if unsuccessful in her action for divorce based upon three cases which arose under the statute which preceded the enactment of the provisions of the District of Columbia Marriage and Divorce Act of 1977. Appellant contends that these cases are not appropriate to the situation before the Court under the statute which existed prior to the 1977 Act and in addition that the effect of the 1977 District of Columbia Marriage and Divorce Act is to change the law regarding the award of attorney's fees in divorce actions.

In *Myers v. Myers*, 55 App.D.C. 224, 4F.2d 300 (1925) the Trial Court granted a divorce to a husband on the ground of adultery and dismissed a cross bill of the wife on the ground of adultery. The Trial Court entered an order determining an amount of attorney's fees to be paid to the attorney for the wife. The Court of Appeals upheld basing its decision on the former statute which made the wife a privileged suitor. It should be noted in addition that the action was brought by the husband.

Ritz v. Ritz, 197 A.2d 155 (D.C. App. 1964) concerned a case in which the Court denied the plaintiff a wife a divorce and maintenance but awarded her \$1,500.00 in counsel fees. Most importantly the Court in its decision based the amount partially on the fact that the wife had not been successful in her suit. The wife had requested approximately \$9,000.00 in attorney's fees and the Court indicated that an appropriate consideration was the fact that the wife had not prevailed. It should be noted that in the case before the Court there was no such consideration by the Trial Court and at the very least then this matter should be remanded for a determination by the Trial Court as to the effect of that change per the decision of this Court on February 15, 1979.

The case of *Jacobson v. Jacobson*, 277 A.2d 280 (D.C.App. 1971) involved a fact pattern so complicated that it could hardly be said that it establishes any absolute discretion of the Trial Court to award attorney's fees in divorce cases to a nonprevailing party. In this unusual case a wife brought suit against her husband for arrears on a Nevada divorce decree. The husband denied the claim on the basis of lack of jurisdiction of the Nevada Court and filed a counterclaim requesting a declaratory judgment that he was still married to the plaintiff. The plaintiff then filed a second action seeking a divorce on the grounds of adultery based upon the defendant living with a woman identified as his second wife with whom he had gone through a marriage ceremony. The husband then filed an action against the "second wife" requesting an annulment of that marriage on the basis of a previously existing union. Included in this tangled web was the request of the wife that she be awarded attorney's fees. The Court granted a divorce to the husband on the basis of separation and granted certain other relief including a determination that the Nevada decree was null and void. Here again the wife was required to defend a claim.

It is submitted that the cases under the former statute do not establish a right to counsel fees nor can the present case before the Court reviewed as establishing a sufficient factual predicate for an award of counsel fees in an amount determined by the Trial Court. In addition under the new statute the status of the wife is radically changed and she is no longer entitled to proceed as a privileged suitor.

The District of Columbia Marriage and Divorce Act of 1977 allows an award of attorney's fees to either spouse. Thus, the Court must balance the financial positions of both parties prior to proceeding to award an attorney's fee to either and the statute makes clear that a necessary condition precedent is that the spouse requesting attorney's fees be unable to otherwise conduct the litigation. Such a situation is not obtained in this matter where the wife has a high educational level and is well able to pay her own attorney's fees.

The appellant urges that on this issue also the petition for rehearing en banc be granted.

Date March 1, 1979

/s/ Thomas Fortune Fay
Thomas Fortune Fay
Attorney for Appellant
Unified Bar #23929
17904 Georgia Avenue
Olney, Maryland 20832

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 13099

REUBEN W. MOORE, JR.,

Appellant,

v.

SIDNEY H. MOORE,

Appellee.

BEFORE: Newman, Chief Judge; Helly, Kern, Gallagher, Nebeker, Yeagley, Harris, Mack, and Ferren, Associate Judges.

Order

On consideration of appellant's petition for rehearing en banc and it appearing that no judge of this Court has called for a vote thereon, it is

ORDERED that appellant's petition is denied.

PER CURIAM

Copies to:

Honorable Richard R. Atkinson

Clerk, Superior Court

Thomas Fortune Fay, Esquire
4601 North Park Avenue
Chevy Chase, MD 20015

Elizabeth Guhring, Esquire
1730 K Street NW, 20006

Appendix D

**Fifth Amendment To The Constitution Of The United
States Of America**

TEXT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.